

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD MULLINS III,

Defendant-Appellant.

UNPUBLISHED

December 10, 2013

No. 312179

Wayne Circuit Court

LC No. 12-000134-FH

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

A jury convicted defendant of operating a vehicle while under the influence of alcoholic liquor (OUIL), MCL 257.625(1)(a), OUIL causing serious impairment of a body function, MCL 257.625(5), and operating a motor vehicle without a driver's license, MCL 257.904(1). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 76 months to 15 years each for the OUIL and OUIL causing serious impairment of a body function convictions, and to time served for the operating a motor vehicle without a license conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS

Defendant's convictions arise from a motor vehicle accident in which a westbound gray Ford Taurus crossed into the eastbound lanes of Cherry Hill Road and struck an eastbound blue Ford Taurus head on. Muoi Thi Chung, the driver of the eastbound vehicle, sustained serious injuries, including several fractures to her leg. Stephen Vidaurri, a Westland police officer on his way to work, observed the accident and stopped to offer assistance. Officer Vidaurri testified that he saw a female, Octavia Larkins, exit the passenger side rear door of the gray Taurus, saw another female, Carmen Robinson, exit the front passenger door of the vehicle, and then saw defendant crawling from the driver's seat, underneath the air bags, to the front passenger seat. Defendant then exited the vehicle from the front and re-entered the vehicle in the rear and sat down in the rear passenger seat. Defendant, who was heavily intoxicated, told another officer that he had not been driving and that it was Robinson who had been driving the vehicle. The principal issue at trial was the identity of the driver of the vehicle.

II. COERCED VERDICT

Defendant first argues that the trial court effectively coerced the jury's verdict when, in response to the jury's requests for a transcript of Officer Vidaurri's testimony, it failed to provide

either a transcript of his testimony or have his testimony read back to the jury. We conclude that any error was waived because defense counsel affirmatively approved the manner in which the trial court responded to the jury's requests.

The trial court advised the jury in response to its first request that a transcript of Officer Vidaurri's testimony was not then available and that the jurors should rely on their collective memories to remember his testimony, but if that did not work a transcript could be prepared but it would not be available that day. After one of the jurors was replaced by an alternate juror and the jury began its deliberations anew, it made another request for Officer Vidaurri's testimony. The court again advised the jurors "to use you collective memories and see if that will help you remember the testimony," but also added, "[i]f not, send us out another note and we will prepare a transcript although it will take some time to get done." On both occasions, defense counsel indicated that the trial court's response was acceptable to defendant. Defense counsel's affirmative approval of the trial court's instructions waived any error. *People v Carter*, 462 Mich 206, 218-220; 612 NW2d 144 (2000). A waiver extinguishes any error, leaving no error to review. *Id.*

Even if this issue had not been waived, however, defendant would not be entitled to appellate relief. "Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered." *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). A trial court may "impress upon the jury the propriety and importance of coming to an agreement, and harmonizing their views, state the reasons therefore and tell them it is their duty to try to agree; but should not give instructions having a tendency to coerce the jury into agreeing on a verdict." *Id.* at 352-353, quoting *People v Strzempkowski*, 211 Mich 266, 268; 178 NW 771 (1920).

A defendant does not have a right to have a jury rehear testimony. Rather, the decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court. MCR 2.513(P). The court rule provides

If, after beginning deliberation, the jury requests a review of certain testimony or evidence that has not been allowed into the jury room under subrule (O), the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration. The court may order the jury to deliberate further without the requested review, as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Thus, a trial court does not abuse its discretion in responding to a request for testimony if it does not foreclose the possibility of having the testimony re-read at a later juncture. Contrary to what defendant argues, the trial court's instructions did not convey to the jury that the possibility of receiving Officer Vidaurri's testimony at a later juncture was foreclosed. Rather, the trial court clearly indicated to the jurors that if their collective memories could not enable them to remember the testimony, a transcript could be prepared, but it would take some time. At no time did the court foreclose the possibility of producing the requested testimony.

Defendant's reliance on *Strzempkowski*, 211 Mich 266, is misplaced because that case is factually distinguishable. In *Strzempkowski*, the trial court, responding to the jury's indication that it could not reach a verdict, told the jury that the issues in the case were relatively simple and that if the jury was unable to reach a verdict it would be discharged for the term and a new jury selected. The Supreme Court found the comments improper and coercive because they caused humiliation to members of the jury. *Id.* at 268. In this case, the trial court's responses did not express any views regarding the nature of the case or the quality of the jury's deliberations, and in no way had a tendency to humiliate the members of the jury. Because the trial court's instructions were not inherently coercive, there was no plain error.

III. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that the evidence was legally insufficient to support his convictions. Defendant was convicted of OUIL, OUIL causing serious impairment of a body function, and driving without a driver's license. An element common to each of these offenses is that defendant was operating a motor vehicle. Defendant argues that there was insufficient evidence to prove that he was the driver of the vehicle in question. We disagree.

On a claim of insufficient evidence, this Court "examine[s] the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine[s] whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *Id.* It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

Although defendant presents different scenarios in which someone else was driving the vehicle, the jury apparently credited the testimony of Officer Vidaurri, who testified that he saw defendant crawling from the driver's seat, under the air bags, and exit out the passenger side front door. That testimony, viewed in a light most favorable to the prosecution, permitted an inference that defendant was driving the vehicle at the time of the accident. The jury reasonably could have concluded that defendant would have no reason to exit the vehicle in such a manner unless he was driving. The credibility of Officer Vidaurri's testimony, and the determination of what inferences could fairly be drawn from the testimony, was for the trier of fact to resolve. This Court will not interfere with the fact-finder's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence was sufficient to permit a reasonable jury to conclude beyond a reasonable doubt that defendant was the operator of the vehicle involved in the accident.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan